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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1648

DEERING MILLIKEN RESEARCH CORPORATION, *Petitioner*

v.

BEAUNIT CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DAVIDSON C. MILLER
Attorney for Petitioner

of Counsel:

ROGER W. PARKHURST
STEVENS, DAVIS, MILLER & MOSHER
1911 Jefferson Davis Highway
Arlington, Virginia 22202

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Petitioner respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered on February 12, 1976, in Appeal No. 74-2233 entitled *Deering Milliken Research Corporation* v. *Beaunit Corporation.*

OPINIONS BELOW

The Opinion of the District Court, reprinted as Appendix A (pages 1a-19a), is reported at 382 F.Supp. 403 (W.D.N.C. 1974). The District Court's Judgment

is reprinted as Appendix B (page 20a). The District Court's Order denying Beaunit's motions for amended findings and new trial is reprinted as Appendix C (page 21a). The unreported Court of Appeals Opinion is reprinted as Apendix D (pages 22a-28a), and the Order denying rehearing is reprinted as Appendix E (page 29a).

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit (Appendix D) was entered on February 12, 1976. An order denying rehearing was entered March 5, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. The Court of Appeals Decision Clearly Ignores Federal Statutes and Decisions of This Court in Basic Settled Respects Requiring Exercise of the Court's Supervisory Powers.

2. The Court of Appeals Decision Clearly Conflicts With Settled Decisions of Coordinate Courts of Appeals Requiring Exercise of the Court's Supervisory Powers to Resolve Such Conflicts.

3. The Court of Appeals Decision Clearly Ignores Applicable Federal Statutes and Decisions of this Court, and Conflicts With Settled Decisions of Coordinate Courts of Appeals, Which When Followed Lead to the Findings and Conclusions Made By the Trial Court, Not Those of the Court of Appeals.

STATUTORY PROVISIONS INVOLVED

Article I, Section 8 of the U.S. Constitution and portions of Title 35 U.S. Code §§ 103 and 282 are involved in this petition. Those portions are reprinted at page 13 and in Appendix F (pages 30a-31a).

STATEMENT OF THE CASE

This extraordinary patent infringement action was brought [28 U.S.C. § 1338(a)] in April, 1972 by petitioner, Deering Milliken Research Corporation ("Milliken") against respondent Beaunit Corporation ("Beaunit"). The invention claimed in the patent was revolutionary to the elastic fabric business. But now the Court of Appeals has supplanted due process of law with summary execution.

Bascum G. Lesley completed his high school education at night school, and over a period of about fifteen years worked to become Director of Development of Deering Milliken Inc's Elastic Fabric Division. In the fall of 1968, Mr. Lesley discovered a warp knit elastic fabric construction which is explicitly defined by Claim 5 of U.S. Patent 3,552,154. Mr. Lesley's discovery turned out to be the first warp knit elastic fabric wherein the elastic threads are laid-in so that they are between and parallel to the wales[1] and maintained, or locked in, by the underlap portions of certain inelastic knitted threads in the fabric so that the elastic threads are substantially fully hidden by the fabric ground construction, while still providing high elastic recovery with minimum cost. Surprisingly, Mr. Lesley's discovery succeeded in achieving all of these desirable quali-

[1] "Wales" are the vertical rows of loops in a knitted fabric.

ties without the use of additional laid-in inelastic covering threads as taught by the prior art.

Milliken's parent corporation marketed Mr. Lesley's fabric in December, 1968. Where prior attempts to achieve these results had failed, Mr. Lesley's fabric filled an existing demand and was an immediate commercial success. Samples of Milliken's fabric came to Mr. Krivitsky, Beaunit's Vice President of Sales and Marketing for Elastic Fabrics, New York City, who reacted with a telex (PT-45) which he sent to the manager of Beaunit's Statesville, North Carolina plant on March 5, 1969:

> RE: TRICOT POWER NETS
>
> THIS IS THE HOTTEST SINGLE ITEM IN THE INDUSTRY AND IT IS IMPERATIVE THAT WE GET A COMMERCIAL NUMBER AS SOON AS POSSIBLE, AND THIS SHUD BE GIVEN TOP PRIORITY. YESTERDAY, WE SENT A SAMPLE OF DEERING MILLIKEN'S STYLE 7157, UNDER OUR SAMPLE #KN 13-69, AND IT APPEARS BY WALE COUNT, THAT THIS FABRIC IS VERY SIMILAR TO OUR 46/68/17C BUT HOLD OUT AND HEAT SET TO 78". THEIR YARN COUNT IS 84% NYLON AND 16% LYCRA, WHEREAS OUR STYLE IS 78% NYLON AND 22% LYCRA, WHICH I ASSUME WOULD BE LOWERED SIMILAR TO THEIRS AFTER HEAT SETTING THE FABRIC. PLS NOTE THAT THE MILLIKEN SAMPLE HAS NO CURL WHATSOEVER AND I ASSUME THIS IS DUE TO THE HEAT SETTING.
>
> HOW SOON CAN U HEAT SET 46/68/17C SO WE CAN SEE THE RESULTS

Mr. Calvert, Manager of Beaunit's Statesville plant, testified that he acted in response to Mr. Krivitsky's telex, that Milliken's fabric style number 7157 (the Lesley invention) was analyzed, duplicated, and put into commercial production.

Mr. Lesley's patent application was examined in the U.S. Patent Office by Primary Examiner Ronald Feldbaum, Bachelor of Science in Textile Engineering, Philadelphia Textile Institute, who at the time had been an examiner in textile technology for over seven years. Examiner Feldbaum cited the best prior art, found Mr. Lesley's claimed invention novel, useful and unobvious over that prior art, and Mr. Lesley's patent issued on January 5, 1971.

J. P. Stevens & Co., Inc., as well as Deering Milliken, Inc. were licensed under the patent. Even though Beaunit had a copy of the patent one week after it issued, Beaunit did not pause to get an opinion of counsel, but continued its infringing activities until sued, and even thereafter!

The District Court heard, saw and considered all of the evidence, expressly considered each of the five claims of the patent (see pages 5a-6a, 13a), and found each of those claims valid and infringed (Appendices A, B & C). The Court of Appeals noted the language of claim 1 only, compared the prior art to a statement of counsel, not the claim language, reversed only one finding of fact by making an assumption not supported by the evidence, and found "the combination used was obvious and not patentable", thereby invalidating all five claims of the patent, without ever saying a word about the subject matter as a whole defined by each of claims 2-5.

Lesley's Claim 5

A warp knitted elastic fabric having, in combination, a knitted ground construction composed of a plurality of pairs of inelastic warp threads formed into a plurality of wales and courses composed of single thread stitches, one thread of each of said pairs forming stitches in adjacent wales and alternate courses, the other thread of each of said pairs forming stitches in non-adjacent wales and alternate courses, wherein said one thread of each of said pairs form said stitches by the bar movement pattern 2-0, 2-2, 2-4, 2-2, said other thread of each of said pairs form said stitches by the bar movement pattern 4-4, 4-6, 4-4, 2-0, *and a plurality of elastic threads inlaid by the bar movement pattern 0-0, 2-2, 4-4, 2-2, said movement patterns being Raschel designations, extending between the wales and generally parallel thereto and being inlaid in the ground construction with a inelastic warp thread of said ground construction wrapped about each of said elastic threads to maintain the same in the ground construction.*

Note: Lesley defines "maintain" (Col. 2, lines 46-53):

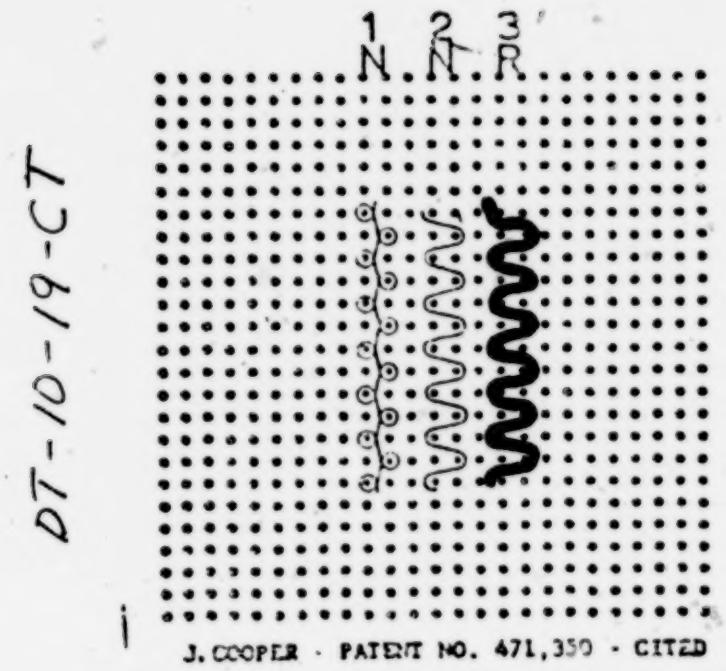
> By maintaining the elastic threads of the fabric between the wales of the fabric and inlaying the same by wrapping the lap portions of the stitches formed by one threat set of the thread pairs about the elastic yarns, the inlaid elastic yarns can be effectively covered by the ground construction with an absence of an undesirable "grin-through" or showing of the elastic yarns.

Claim 5 of the patent (as to which the Court of Appeals was silent) illustrates both what the Court of Appeals did not do, and the errors in what it did do. Claim 5, a dependent claim in the patent, is reprinted, including the language of claim 1, on the facing page.

Having intentionally copied, Beaunit does not argue noninfringement. Is is also conceded that there is no prior art identically disclosing the Lesley invention.

The prior art asserted by respondent Beaunit, and applied by the Court of Appeals, *is the very same prior art expressly considered by the learned Examiner before allowing the Lesley patent!* That is Auville, filed 1965, and Cooper, filed 1891.

Graham v. *John Deere Co.*, 383 U.S. 1, 17 (1966) directs factual inquiry in determining the scope and content of the prior art and ascertaining the differences between the prior art *and the claims at issue.* The scope and content of Auville is not disputed. Auville discloses a fabric which is only a part of the Lesley invention as a whole. The factual dispute concerns the scope and content of Cooper and whether Cooper is combinable with Auville to obviate Lesley's claimed invention.



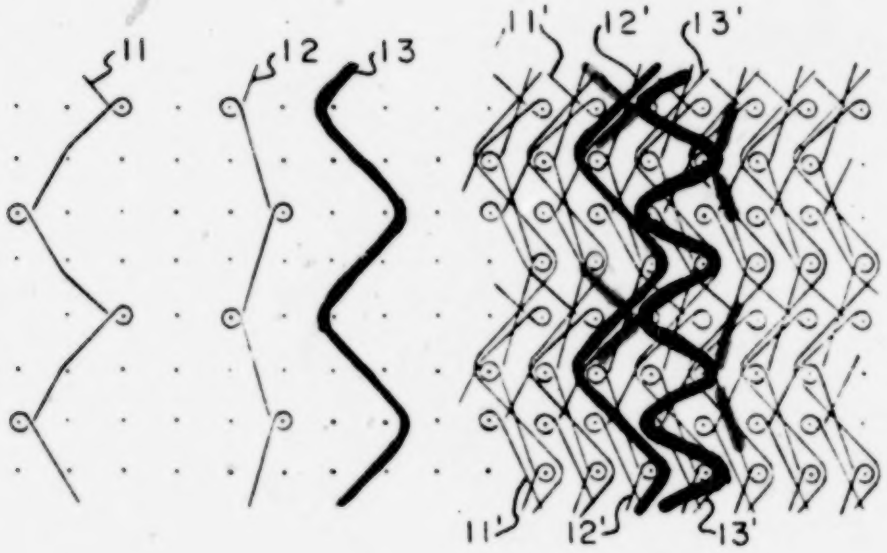


FIG. -2-
B. G. LESLEY

NOT ONE STITCH OR LAID-IN YARN IN COOPER CONFORMS TO THOSE CLAIMED BY LESLEY! This point is illustrated on the facing page. Cooper's pattern was illustrated in Beaunit's Exhibit DT-10-19-CT. Lesley's combined pattern, the one specified in Claim 5, is shown in the right side of Lesley's Figure 2. Superimposing Cooper's (red)[2] lay-in on Lesley (green)[2] demonstrates that it is clearly different. Furthermore *this difference causes a clearly different result* because the lapping movements of Cooper's laid-in yarn are out of phase, i.e. go in opposite directions from Lesley's ground construction (orange)[2]. *Hence Cooper's laid-in yarn would remain crossing wales, not between and parallel to the wales, and not wrapped about and effectively covered by the ground construction as is expressly claimed by Lesley.* The italicized portion of Claim 5, page 6, supra, recites these points which are absent from Cooper, Auville or the combination thereof. This result was in effect admitted by Beaunit's expert Mr. Hudson (Record 31 Jan. 74, p. 260).

There is no evidence in the prior art suggesting combining Cooper with Auville. Beaunit's expert admitted "... Cooper doesn't suggest the Auville background for his invention." (Record 18 Feb. 74, p. 179). Milliken's expert Dr. Brown said there was "no suggestion of laying-in" yarns in Auville (Record, 19 Feb. 74, p. 1490). Beaunit's attorney admitted to the Court of Appeals that this was a "question about the case" (Hearing transcript, p. 10).[3]

---

[2] Colors added here.

[3] And erroneously told the Court of Appeals there was no argument about that (Hearing transcript, p. 11; Cf. Appellee's Brief, p. 30)

The Court of Appeals erroneously reduced the *invention as a whole* to "wraparound" *alone.* The Court of Appeals found that feature in Cooper and erroneously stated that "there was no disagreement among the experts on this "wrap around" feature of Cooper . . ." (Appendix D, p. 28a). *Not only was there disagreement among the experts of the respective parties; there was a startling disagreement between Beaunit's two experts themselves!* The Court of Appeals supported its finding of wrap around for cover in Cooper by quoting Beaunit's expert Mr. Hudson "with regard to Cooper that 'the *underlaps*[4] of the ground bar, in fact, wrap around the rubber thread exactly as they do in Figure 1 of the Lesley patent'." Yet Beaunit's other expert Mr. Titone, on cross-examination said it was the "overlaps"[5] *not the underlaps* that cover the face of the Cooper fabric (Record, 19 Feb. 74, p. 200). Beaunit's attorney admitted to the Court of Appeals that Cooper's ground construction *did not cover* all sides of the elastic thread (Hearing transcript, p. 24). Cooper clearly needed additional laid-in yarns h. As to that cover yarn h, Beaunit's expert Mr. Titone admitted, "If he added it for cover alone, if that was specifically the reason why he added it, then it wouldn't make sense to leave it out." (Record 18 Feb. 74, p. 200). Cooper expressly called it "covering-strands h".

With that kind of evidence, much of it testimony from live witnesses, it is difficult to justify, let alone

[4] The 'underlaps' are the lengths of yarn which cross wales and join the knitted loops in different wales.

[5] The 'overlaps' are the knitted loops themselves.

understand, the appellate Court's reversal of the trial Court's finding of fact:

> It is clear from an examination of Cooper as a whole that he had no conception of wrap around for cover purposes. (Appendix A, p. 8a)

The Court of Appeals then quoted, out of context, a statement made by Milliken's expert Dr. Brown "referring to the [Cooper] drawing only out of context, not in the context of the patent but just as a drawing" (Record 19 Feb. 74, p. 1503) saying that it showed his agreement that Cooper taught wrap around. The Cooper patent itself denied that:

> When the fabric is distended, as shown, the rubber strands and covering-strands *h* will be drawn to position between the lines of loops formed by the warp-knitting threads *k* and the portions of the latter extending between the lines of loops will have the *appearance* of being wrapped around the strands *e* and *h*, though, *in fact,* in the process of knitting the strands *e* and *h* are lapped around or upon the threads *k,* all as will be understood by persons skilled in the knitting art without further description. (emphasis ours)

Dr. Brown, Ph.D. Knit Fabrics, having heard the testimony of Beaunit's experts concerning Cooper, testified:

> Q. Now did you hear the witnesses Titone and Hudson testify respecting the presence of the subject matter of Amendment of Lesley's Claim 1 in Cooper?
> A. Yes, I did.
>
> Q. Do you agree with that?
> A. No. I profoundly disagree with that conclusion.

Q. Would you explain to the Court your reason for your disagreement?
A. Well, in short, I think both of these gentlemen based their opinion on a very superficial look at the figures and the language of the patent, and if we look into it a little more carefully in either the 350 or 349 Cooper patents, we can see that their conclusion was just incorrect.

* * *

. . . in spite of the fact that Mr. Cooper is trying for economy he has to use a cover yarn, indicating incomplete cover by whatever wrapping may or may not occur, it seems to me that what he is telling us here is that in fact you do not get the yarns *k* wrapping around. You get the reverse of this position. (Record, 19 Feb. 74, pp. 1476-1479)

The District Court properly noted the disagreement among the experts (Appendix A, p. 13a).

The evidence establishes, without doubt, that Mr. Lesley's claimed fabric has been a commercial success. Beaunit's attorney elicited cross-examination testimony from Mr. Eugene Cooper and Mr. Andrew Robinton (each long experienced in marketing elastic fabrics) showing the existing demands—long felt needs—which Mr. Lesley's invention fulfilled (Record 29 Jan. 74, pp. 23-27, 41-42), Mr. Lesley testified about attempts of others to maintain laid-in elastic parallel to the wales, which attempts were demonstrably failures (Record, 19 Feb. 74, p. 872). The prior art was old. Beaunit's experts testified that the 1965 Auville stitch, like the 1958 Aibel stitch, was just one version of the old Denby stitch (Record 31 Jan. 74, p. 205, 18 Feb. 74, p. 171). Cooper filed in 1891.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS CLEARLY IGNORES THE APPLICABLE STATUTES AND DECISIONS OF THIS COURT IN RESPECTS SO BASIC THAT THIS COURT'S SUPERVISORY POWERS MUST BE EXERCISED. SETTLED LAW IS IGNORED BY THE COURT BELOW, CREATING CONFLICTS AMONG THE COORDINATE COURTS OF APPEALS.

The District Court expressly quoted and considered each of the five claims in the Lesley patent. That was in accordance with 35 U.S. Code § 282:

> Each claim of a patent (whether in independent or dependent form) shall be presumed valid independently of the validity of other claims; dependent claims shall be presumed valid even though dependent upon an invalid claim.

Or, as the Second Circuit recently said:

> Each of the claims constitutes in effect a separate patent whose validity is independent of that of the remaining claims. *Timely Products Corp.* v. *Aaron,* 523 F.2d 288, 296 (2nd Cir. 1975)

Here the Court of Appeals indicated no effort whatsoever to consider Lesley's claims 2-5.

The ruling of the Fourth Circuit in this case is thus not only contrary to statute, but also is in direct conflict with the rule of another Court of Appeals.

The Court of Appeals further ignored the applicable statute and decisions of this court by not considering the claimed invention "as a whole", 35 U.S.C. § 103:

> A patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter *as a whole* would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains. (Emphasis ours)

The Court of Appeals, after quoting the language of Lesley's claim 1 only, said:

> . . . it was not the ground construction that was patented, nor the inlaying of the elastic threads, but rather that the threads of the ground construction would be utilized in the wrapping of the elastic threads (Appendix D., p. 25a)

The Court of Appeals continued its improper oversimplification by repeating that Milliken's attorney, in an exchange during a deposition, said that "the whole point of the invention is that you wrap around the elastic," (Appendix D. p. 28a-29a). But that too, is not the claimed invention *as a whole*. This Court has clearly condemned that approach.

> We cannot agree. For if anything is settled in the patent law, it is that the combination patent covers only the totality of the elements in the claim and that no element, separately viewed, is within the grant. See the Mercoid cases, supra, 320 U.S. at 667; 320 U.S. at 684. The basic fallacy in respondent's position is that it requires the ascribing to one element of the patented combination the status of patented invention in itself. Yet this Court has made it clear in the two Mercoid cases that there is no legally recognizable or protected "essential" element, "gist" or "heart" of the invention in a combination patent. In Mercoid Corp. v. Mid-Continent Co., supra, the Court said:
>
> > "That result may not be obviated in the present case by calling the combustion stoker switch the 'heart of the invention' or the 'advance in the art.' The patent is for a combination only."
>
> * * *
>
> *Aro Mfg. Co. Inc.* v. *Convertible Top Replacement Co.*, 365 U.S. 336, 344, 345 (1961)

The words of Mr. Justice Rehnquist, joined by Justices Stewart and Blackmun, dissenting in *United States* v. *Glaxo Group Ltd.*, 410 U.S. 52, 64 (1973) precisely characterize the actions of the Court of Appeals here:

> The Court has undertaken to substitute its judgment for that of Congress in the initiation of novel procedures for the determination of patent validity, ...

Each claim of a U.S. Patent is a prima facie property right, 35 U.S.C. §§ 154, 261, 282 (Appendix F). Where that right has been granted by the requisite authority, and has been confirmed by a U.S. District Court after a full hearing, a Court of Appeals which ignores the language of the applicable statutes and decisions of this Court effectively deprives the owner of his property without due process of law.

Had the Court of Appeals followed the statutory and judicial mandates to separately consider *each* claim, 35 U.S.C. § 282, and each claimed invention *as a whole*, 35 U.S.C. § 103, petitioner respectfully submits that a different result would have been reached.

The "differences between the prior art and the claims at issue" *Graham* v. *John Deere Co.*, supra, are clear, but the Court of Appeals ignored them also:

1. Cooper did not teach effectively covering laid-in elastic yarns without additional laid-in covering yarns.

2. Not one stitch or laid-in yarn of Cooper conforms to those *claimed* by Lesley.

3. There is no suggestion in either Auville or Cooper, or any other evidence, to combine one with the other.

4. Even if combined with Auville, Cooper's lay-in does not produce Lesley's claimed invention, which achieves surprisingly different results.

As Milliken argued to the Court of Appeals:

> I cannot see how you have a teaching of obviousness when you have a pattern that points the other way and *every single parameter in the structure of the pattern has to be changed* before you can get anything useful from it (Hearing Transcript, p. 17).

Those differences clearly demonstrate that this is not simply a case where each and all of the components of the claimed combination were old in the prior art and united without change in their respective functions, Cf. *Sakraida* v. *Ag Pro., Inc.*, —— U.S. ——, decided April 20, 1976; *Anderson's Black-Rock* v. *Pavement Salvage Co.*, 396 U.S. 57 (1969); *Great A & P Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147 (1950). Here the gap between the prior art and Lesley's claimed invention was clearly so great that Mr. Lesley's invention was non-obvious to one reasonably skilled in the art at the time the invention was made, Cf. *Dann, Com'r Pats.* v. *Johnston*, ——U.S. ——, decided March 31, 1976. Mr. Lesley's inventive elastic fabric effectively maintained, locked in, and covered laid-in elastic yarns, without using additional laid-in yarns, while still providing high elastic recovery. Neither Cooper nor Auville nor the combination thereof did that.

> Suffice it to say that the . . . claims in issue, involving as they do a mechanical principle of theretofore unappreciated and unrecognized application to the art, amounted to considerably more than a mere felicitous selection of known elements contributing in combination an obvious result. *Coats Loaders & Stackers, Inc.* v. *Henderson*, 233 F.2d 915, 921 (6th Cir. 1956)[Stewart J.]

Also see *CTS Corp.* v. *Piher International Corp.*,—— F.2d——, 188 U.S.P.Q. 419, 422 (7th Cir. 1975) [Justice Clark, Stevens, Grant, JJ.]

From whence came the evidence that is is obvious to combine Cooper with Auville to obviate Lesley's claims? It did not come from Cooper or Auville. Beaunit's expert admitted that. It did not come from the Examiner who recognized that Cooper plus Auville did not equal Lesley; he certainly never made any such rejection of claim 5. He allowed the claims.

> . . . The mere fact that . . . disclosures *can* be combined does not make the combination obvious unless the art also contains something to suggest the desirability of the combination. In re Bergel, 48 C.C.P.A. 1102, 292 F.2d 955, (1961). We find no such suggestions in these references. *In re Imperato*, 486 F.2d 585, 587 (C.C.P.A. 1973).

Also see *In re Regel*, —— F.2d ——, 188 U.S.P.Q. 136, 139 (C.C.P.A. 1975). ***Hence the Fourth Circuit's decision also is in direct conflict with the rule of the coordinate Court of Customs and Patent Appeals!***

Any evidence suggesting combination of the references must have come from the conclusory opinions given in the live testimony of Beaunit's expert witnesses. The credibility, weight and persuasivness of such evidence is the province of the trial judge. Rule 52, F.R. Civ. P.; *Graver Tank Co.* v. *Linde Air Products Co.*, 339 U.S. 605, 609-610 (1949); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). ***The trial Court's findings were not clearly erroneous and should be reinstated here.***

Finally we note that all of the objective equitable points this Court noted in *Graham* v. *John Deere Co.*, supra, are present in this case: commercial success, long felt but unsolved needs, failure of others. Beaunit's intentional copying of a patented product is further evidence of what the rest of the world ought to think of the invention, *Otto* v. *Koppers Co.*, 246 F.2d 789 (4th Cir. 1957) *cert. denied* 355 U.S. 939 (1958). Still further, if Cooper (1891) in conjunction with the old Denby stitch, were the necessary elements to create Lesley's claimed invention (which they were not) they had been available to skilled artisans for too long to blithely say Lesley is obvious, *Timely Products Corp.* v. *Aaron*, supra; *Reiner* v. *I. Leon Co., Inc.*, 285 F.2d 501, *cert. denied* 366 U.S. 929 (1960). And the Examiner fully considered that prior art before allowing Mr. Lesley's claims!

While this Court in *Graham*, supra called such evidence "secondary", and said, "as indicia of . . . nonobviousness, these inquiries may have relevance," *it is too much of a coincidence that all of these objective facts are present and point toward the non-obviousness of Lesley's claimed invention.*

> Here, however, both direct evidence and secondary evidence was presented. In such a situation we think that the trier of facts is permitted to consider the secondary evidence as admissible evidence.
>
> *Com'r Pats.* v. *Deutsche Gold-und-Silber-Scherdeanstalt Vormals Roessler*, 397 F.2d 656, 672 (D.C. Cir. 1968) [Burger, J.]

Mr. Lesley's invention had long eluded those skilled in the art. It clearly added to the sum of useful knowledge. It is the kind of progressive discovery contemplated by the Constitution. All of the evidence leaves the thorough conviction that the District Court was correct and that the Court of Appeals erred.

Respondent will tell you: this case is of minimal importance. Not true. The Lesley fabric is the single largest selling elastic fabric in this country today! Hundreds of thousands of yards of it are made each year. Milliken has licensed two of the world's largest manufacturers, and has offered licenses to the entire industry. Those offers precipitated four suits against Milliken, which in turn spawned additional suits, all of which are stayed pending final resolution of this case. The entire textile industry awaits its outcome. Even more important are the above discussed adverse affects of the lower Court's opinion on the settled law.

In placing its vigor behind the law of trade secrets, this Court in *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 491 (1974) said

> . . . that the extension of trade secret protection to clearly patentable inventions does not conflict with the patent policy of disclosure.

Conversely, the recent patent decisions of this Court, namely *Sakraida* v. *Ag Pro., Inc.*, *Dann* v. *Johnston*, and *Anderson's-Black Rock* v. *Pavement Salvage Co.*, *supra*, all indicate that patentability is still in the same state it was in 1958 when the now Chief Justice said:

> . . . I think that the decisions in their present state impose barriers to patents far more stringent than contemplated either in the first instance by the Constitution or later by Congress.
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> * * *

> This hardly seems the way to encourage maximum incentive for those engaged in research and invention. *C.H. Boehringer Sohn* v. *Watson, Com'r Pats.* 256 F.2d 713, 714 (D.C. Cir 1958) [Burger, J., concurring specially]

As a temporary right to exclude, a patent simply gives an inventor "lead time", in return for his disclosing his invention to the public. With the presently strong trade secret laws, unless this Court from time to time expressly demonstrates that some patents are valid, inventors are whenever possible going to obtain that "lead time" by keeping their inventions under the more hospitable wraps of the trade secret laws. That is contrary to the socially desirable patent policy of disclosure. Where that is economically unfeasible, for example as it often is for impecunious or individual inventors, or as in the present case where sales of the invention necessarily disclose it, an inventor's only recourse is the patent laws.

This Court has not validated a patent in over ten years, *United States* v. *Adams,* 383 U.S. 39 (1966). This case contains both basic legal questions requiring certiorari and all of the salutary aspects of a valid patent. This Court should be looking for such a case. This is it. Issue the writ. Re-settle the law. Correct the unjust result.

Respectfully submitted,

DAVIDSON C. MILLER
Attorney for Petitioner

of Counsel:

ROGER W. PARKHURST
STEVENS, DAVIS, MILLER & MOSHER
1911 Jefferson Davis Highway
Arlington, Virginia 22202

May, 1976

APPENDIX

APPENDIX A

[Dated April 16, 1974]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

Civil Action St-C-72-10

DEERING MILLIKEN RESEARCH CORPORATION, *Plaintiff*,

v.

BEAUNIT CORPORATION, *Defendant*.

Memorandum of Decision

The plaintiff, Deering Milliken Research Corporation, (*Milliken*), a South Carolina corporation with its principal office located at Spartanburg, South Carolina, brings this patent infringement action against the defendant, Beaunit Corporation, (*Beaunit*), a New York corporation with a manufacturing plant located at Statesville, which is within the Western District of North Carolina, seeking injunctive relief from future infringement and an accounting of damages and profits made from past infringement.

The defendant admits the issuance of the Patent but denies title, validity, and infringement, and alleges misuse.

The issues were tried by the Court, without a jury, at the February, 1974 Term at Statesville, and the Court now enters its findings and conclusions.

On January 5, 1971, the United States Patent Office issued to *Milliken* as assignee of Bascum G. Lesley, Letters Patent No. 3,552,154 based on application serial No. 815,572 filed April 14, 1969. The application disclosed a textile knit fabric invented by Bascum G. Lesley, Pickens, South Carolina, who on April 10, 1969 executed a paper-writing under his hand and seal assigning to *Milliken* his entire right, title and interest in and to such invention or improvements and the applications for a patent. A certificate

of acknowledgment under the hand and official seal of a notary public of South Carolina was affixed to the assignment and the document was thereafter accepted, filed and recorded in the Patent Office. Such assignment meets the requirements of 35 U.S.C.A. § 261, and *Milliken* is the owner of Letters Patent No. 3,552,154 and is entitled to bring this action for its infringement.

The invention in question relates to a novel textile knit fabric and, more particularly, to a warp fabric construction employed in the production of elastic fabrics composed of elastic and inelastic thread components. Such fabric is widely used in the manufacture of support garments, such as girdles, corsets, brassieres, and the like, as well as outer garments which are designed to closely conform to the body of the wearer and to stretch with the various movements of the body.

The patent discloses an elastic warp knit fabric comprising a ground construction composed of inelastic threads knitted in a plurality of courses and wales of single thread stitches, and elastic threads inlaid between the wales and extending generally parallel thereto.

The inventor recognized in his statement of specifications that, prior to his invention, textile warp knit elastic fabrics composed of elastic and inelastic thread components were widely used in the manufacture of support garments as well as outer garments which were designed to closely conform to the body of the wearer. Among these elastic fabrics were the so-called "powernet" types which were open mesh or net fabrics wherein the inelastic threads were knitted into a ground support construction and the elastic threads were inlaid or formed in stitches therewith to provide an open knit elastic fabric having high stretch recovery in one or more directions, depending upon the disposition of the elastic threads in the fabric. These powernet fabrics possessed certain drawbacks in that their open mesh construction made them quite transparent, so that

portions of the body or undergarments were visible through the fabric.

To avoid the transparent or "see-through" quality in garments made from elastic powernet fabrics the textile industry designed and produced an elastic fabric of solid or opaque construction. This fabric was generally made by knitting in both elastic and inelastic threads into the fabric construction, with the inelastic threads knitted in a double thread stitch arrangement to facilitate cover and to obtain the desired opaqueness necessary to avoid "see-through" in garments made from such fabric. This opaque elastic fabric construction required greater quantities of yarn, and particularly more of the expensive elastic yarns, thereby increasing the weight and cost of the fabric.

The inventor declares that it is an object of his invention to provide a solid, opaque, warp knitted elastic fabric containing elastic and inelastic threads which is of light weight construction and is more economical to produce than such knit fabrics of the prior art. This and other objects of the invention are accomplished by providing a warp knitted elastic fabric having, in combination, a ground construction composed of a plurality of pairs of inelastic threads, one set of warp threads of the pairs forming stitches in alternate courses and adjacent wales, and the other set forming stitches in alternate courses and non-adjacent wales to produce single-thread stitches throughout the construction, and elastic threads laid in the ground construction generally parallel to and between the wales of the fabric and covered by lap portions of certain of the inelastic threads to effectively hide the elastic threads and prevent undesirable "grin-through" of the threads in the fabric. The resulting opaque elastic fabric has high stretch recovery and is appreciably more economical to produce than the solid elastic knit fabrics of the prior art, due to the ability to employ much less yarn in the fabrics both by laying in the elastic yarns in a generally straight line arrangement and utilizing relatively heavy, inexpensive in-

elastic threads in a single thread stitch disposition to cover and contain the elastic yarns throughout the fabric.

Since stresses are constantly exerted on support and closely fitting garments it becomes important and desirable to construct a fabric which will resist "splitting" or "parting" which readily occurs in fabrics knit in the conventional manner. The inventor claims that an object of the invention is to prevent such splitting or parting by knitting the inelastic ground construction of the warp knitted elastic fabrics by employing separate guide bars for the two inelastic thread sets, composing the plurality of pairs of inelastic threads, with each set being fed into the knitting needles from the guide bars so that the thread sets alternate in the formation of stitches in courses to provide single thread stitches throughout the fabric. In addition, one guide bar may be shogged over at least one wale between the formation of stitches during the knitting operation to produce unknitted thread floats tying non-adjacent wales of the fabric together, as well as providing additional cover in the fabric. By connecting non-adjacent wales in this manner, if a thread breaks in the ground construction, the fabric may run but will not readily split apart, as would be the case if such a single-thread stitch ground construction was knit employing a single guide bar.

Another object of the invention was to avoid an undesirable "grin-through" or showing of the elastic or rubber yarns when the fabric is stretched. This is accomplished by maintaining the elastic threads of the fabric between the wales of the fabric and inlaying the same by wrapping the lap portions of the stitches formed by one thread set of the thread pairs about the elastic yarns, so that the inlaid elastic yarns can be effectively covered by the ground construction. This permits the use of bare spandex or rubber yarns for economy and maximum stretch recovery which are substantially fully covered by the ground construction so that they are hidden from view to provide a smoother, more aesthetically attractive fabric.

The patent teaches that the relatively inelastic threads forming the ground construction of the invention may be composed of any man-made or natural continous filament or spun yarns of relatively inelastic nature, while the elastic threads may be composed of rubber, spandex, or other man-made yarns having a high modulus of elasticity or stretch recovery. Typical of the yarns which may be used in forming such fabrics are nylon and Lycra.

The inventor advanced the following five claims:

1. A warp knitted elastic fabric having, in combination, a knitted ground construction composed of a plurality of pairs of inelastic warp threads formed into a plurality of wales and courses composed of single thread stitches, one thread of each of said pairs forming stitches in adjacent wales and alternate courses, the other thread of each of said pairs forming stitches in non-adjacent wales and alternate courses, and a plurality of elastic threads extending between the wales and generally parallel thereto and being inlaid in the ground construction with an inelastic warp thread of said ground construction wrapped about each of said elastic threads to maintain the same in the ground construction.

2. An elastic fabric as defined in claim 1 wherein lap portions of the stitches of said one thread of each of said pairs of threads is wrapped about said elastic thread to substantially cover and inlay the same in the fabric.

3. An elastic fabric as defined in claim 2 wherein said other thread of each of said pairs or threads has unknitted thread sections extending across at least one wale between stitches.

4. An elastic fabric as defined in claim 1 wherein the stitches of said one thread of each of said pairs are generally horizontally disposed throughout said fabric, and the stitches of said other thread of each of said pairs of threads are generally vertically disposed throughout the fabric.

5. A warp knitted elastic fabric as defined in claim 1 wherein said one thread of each of said pairs form said stitches by the bar movement pattern 2-0, 2-2, 2-4, 2-2, said other thread of each of said pairs form said stitches by the bar movement pattern 4-4, 4-6, 4-4, 2-0, and said plurality of elastic threads are inlaid by the bar movement pattern 0-0, 2-2, 4-4, 2-2, said movement patterns being Raschel designations.

The defendant alleges certain deficiencies in the specification and claims of the Lesley patent. 35 U.S.C.A. § 112 requires that the specification of a patent be stated in such a manner as to enable one skilled in the art to which it pertains to make and use the claimed invention. Here, once the skilled artisan is given the stitch pattern and the fact that two groups of inelastic (nylon) threads and one group of elastic spandex threads are used to make the fabric, he is enabled to make said fabric, and that part of the statute is complied with. If the specification enables the making of the fabric the presence of minor errors in said specification does not detract from its compliance with the statute. None of the expert witnesses had any difficulty recognizing the fabric described in the specification and in Figure 2 of the patent as the same fabric produced by Deering Milliken, Inc., and the defendant.

The other requirement of Section 112 is that the claim particularly point out and distinctly claim the invention. The Examiner (whose duty it was to examine the application under Section 112) found the claims to comply with the statute. Dr. Brown, plaintiff's expert witness, clearly understood the claims, and Mr. Titone, one of defendant's expert witnesses, had no great problem with the claims. Mr. Hudson, the defendant's other expert witness, testified that the claims were unclear. However, he had no difficulty in characterizing the claimed invention as being obvious. It is somewhat difficult to comprehend how he could find the invention to be obvious if he didn't understand the claims.

This patent is presumed to be valid and the burden of establishing invalidity rests upon the defendant. 35 U.S.C.A. § 282. In an effort to overcome this presumption of validity the defendant has advanced the following contentions: (1) the Examiner made a mistake during the prosecution of the patent application, and (2) that better prior art was in existence than was cited by the Examiner.

Plaintiff's Exhibit 3, the file wrapper of the patent in suit, reveals that the application as originally filed contained four claims. Claim 1 was an independent claim and Claims 2, 3 and 4 appear in the patent in the same language as they appeared in the application. These claims were acted upon by the Examiner in an Office Action dated November 21, 1969 and in the Summary of Action he stated that all four of the claims would be allowed if amended as indicated, and that Claim 1 was rejected.

Only Claim 1 was rejected as unpatentable over *Auville* 3,442,099 in view of *Cooper* 471,350 under 35 U.S.C.A. § 103. However, in the same action the Examiner employed the following language:

> "The Examiner notes that this application contains allowable subject matter. The claims would be allowed if a more detailed and meaningful recitation of stitch structure involving the elastic threads and threads B, are set forth in the base claim."

It is clear that "base claim" means the independent Claim No. 1. The applicant amended Claim 1 by adding the following language:

> " * * * With an inelastic warp thread of said ground construction wrapped about each of said elastic threads to maintain the same in the ground construction."

After the addition of that language, the claim was allowed and it appears as Claim 1 in the patent.

Because Claim 1 and Claim 4 which depends upon it did not, as originally filed, contain the language respecting the wrapping of the warp threads about the elastic threads, the defendant contends the Examiner erred in his interpretation of *Cooper*. The defendant states that *Cooper* shows in Figure 3 of his drawing a fabric in which "the warp knitting threads (k), and the portions of the latter extended between the lines of *loops* will have the appearance of being wrapped around strands (e) and (h) . . ." The defendant's theory is that adding to one's claim something taken from the prior art would not make the claim patentable.

It appears that the defendant relies upon the drawings and the fragment of language mentioned above and not upon the document as a whole. Incidental bits of disclosure taken from the prior art which does not as a whole, teach the conception of the patent sought to be anticipated are not a proper basis for anticipation. See *In Re Cramblet*, 62 F.2d 358 (C.C.P.A. 1932); *Trussell Manufacturing Co.* v. *Wilson-Jones Company*, 50 F.2d 1027 (2nd Cir. 1931); *Brill* v. *Third Ave. R. Co.*, 103 F. 289 (S.D.N.Y. 1900).

It is clear that from an examination of *Cooper* as a whole he had no conception of a wrap around for cover purposes and from the drawings alone it is not possible to identify which yarns are elastic and which are not. Indeed from the drawing alone *Cooper* might be supposed to disclose a form of fish net. It therefore appears that the Examiner considered the whole *Cooper* disclosure including the other *Cooper* patent to which the cited *Cooper* patent refers. From this whole disclosure a picture emerges quite different from that painted by the defendant.

Cooper read as a whole does not disclose the concept embodied in *Lesley*. The fabric disclosed by *Cooper* is a one-way stretch fabric having elasticity only in the direction of the wales, while the *Lesley* disclosure, teaches a

construction which inherently has a two-way stretch. It was not error for the Examiner to consider that *Cooper* lacked relevance to the *Lesley* disclosure in view of the fact that it shows a fabric elastic only in the length thereof and not in the width.

In so far as Claim 2 is concerned, *Cooper*, in unequivocal language, states that he does not use the warp threads (k) as cover which is directly contrary to the wording of the *Lesley* Claim 2. It is certainly no indication of error that an Examiner would allow a claim which directly specifies something quite contrary to that which the prior art shows.

Cooper teaches that it is necessary to have an extra, a fourth, yarn for cover, it being established that bare rubber and bare spandex are unacceptable for wear next to the skin. *Lesley* Claim 2 provides for the elimination of that extra yarn for cover purposes and leads to a classic patentability situation that a machine or article that is made with fewer parts or fewer components than the prior art, but which accomplishes all of the functions of the prior art, is the type of improvement which merits a patent. In *Glade* v. *Walgreen Co.*, 122 F.2d 306 (7th Cir. 1941), *cert. denied*, 314 U.S. 692, 62 S.Ct. 362, 86 L.Ed. 553, the court said, at 122 F.2d Page 309:

> "We find nothing in the statute, or in the decisions cited, which would preclude plaintiff from receiving a patent for a combination, even though it produced the same result as other such devices, if it produced that result with fewer elements than had theretofore been used or thought necessary. This is precisely what plaintiff did. Theretofore others had produced the same general result with five or more elements, whereas plaintiff produced the same general result more efficiently with three elements. It is not fair to say that Martin uses the same old elements as those before him, for there are at least two of the old elements used in prior devices which Martin does not use at all.

> In other words, he produces the same result in a more efficient and facile manner by making three of those old elements accomplish the same general result as five or more had theretofore done."

Since Claim 3 depends upon Claim 2, the foregoing findings are equally applicable to it. The evidence and the Patent Office record indicate that the Examiner properly applied the *Cooper* reference so that the presumption of validity which normally attaches is not overcome by any inference of error on the part of the Examiner.

In addition to the alleged error of the Examiner *Beaunit* contends that the presumption of validity is lost because prior art, better than the art before the Examiner, was presented to the Court during the trial of the case. In order to overcome the presumption of validity *Beaunit* has the burden of establishing that other art which is cited is truly more relevant to the patent claims than the art which the Examiner considered. *Beaunit* cites and relies upon a number of patents, prior art designs and publications in an effort to overcome the presumption. Mr. Titone, defendant's expert witness, described a fabric which had been made from some notes appearing in a notebook belonging to his father, dated November 28, 1941 and referred to as Nedich Celustra Style 5427. When asked by *Milliken's* attorney which of the prior art he considered more relevant than the combination of *Cooper* with *Auville*, his answer in substance was that the *Decker* patent had not been cited and that the Nedich Celustra Fabric Style No. 5427 might be considered as an embodiment of the combination of *Auville* with *Cooper*.

The *Lesley* file wrapper shows that the Examiner searched Class 66, Subclasses 190 to 195 and 169 to 171, and the record shows that Decker was in Subclass 193 at the time the search was made. Courts have generally held that such a search record is a *prima facie* indication that the patent was considered by the Examiner and not regarded as of sufficient importance to cite. In *Harris-Hub Co., Inc.* v. *Lear Siegler, Inc.*, 179 U.S.P.Q. 469 (N.D. Ill. 1973), the Court said at Page 475:

> "The presumption of validity is still further strengthened here because the examiner searched in the same class and subclass in which the Thirlwall patent relied on by Defendant is classified; under such circumstances, it is presumed that the Patent Office considered the Thirlwall patent and discarded it. Uarco v. Moore Business Forms, supra at p. 585; 169 USPQ at 267; Stuart W. Johnson & Co. v. Ro-Ber, supra at pp. 181 & 183; King-Seeley Thermos Co. v. Tastee Freez Industries, supra at p. 600."

The Court finds that to make the claims of *Lesley* read on Nedich Celustra Style 5427 it is necessary to change the construction of the fabric to alter the interrelation of the yarns in a manner which is not suggested in the notebook from which it was taken. If the third bar of the disclosure were used as the notebook teaches, the *Lesley* claims would not read on the resulting fabric because there would be double thread stitches where the *Lesley* claims require single thread stitches. The *Lesley* claims would not read on any portion of the length of Style 5427 if it were made according to the notebook. No modification of the fabric is taught or suggested in the notebook from which it was taken. The fabric, according to *Beaunit's* expert, contains the entire *Lesley* fabric for if one knits the first, second and fourth bars of the fabric, omitting the third bar, and if one knits four courses selected from twelve, omitting eight courses of the twelve, one can create a fabric in 1974 very similar to the *Lesley* fabric.

This contention runs afoul of the doctrine recognized in *Spring Cotton Mills* v. *Hall Laboratories*, 208 F.2d 500 (4th Cir. 1953) and *Skelly Oil Co.* v. *Universal Oil Products Co.*, 31 F.2d 427 (3rd Cir. 1929) but perhaps more fully stated in the British case of *Minnesota Mining and*

Manufacturing Co. v. *Bondina, Ltd.*, reported in 1973 R.P.C. 491, at page 530, as follows:

> "Four expert witnesses were examined and cross-examined at length on the details of the experiments, which accounted for a large proportion of the time occupied by the evidence, and it is regretable that, as the hearing proceeded, it became clear that the legal foundation of the most significant parts of the experiments was erroneous. In any event, they resulted in nothing more than confusion between the issues of anticipation, to which they were ostensibly directed, and the issue of obviousness, which cannot possibly be decided by experiments that merely beg the question by making additions to or changes in the instructions given by the prior document, designed to assimilate it to the patent in suit without considering whether they are obvious or not."

Dr. Brown, *Milliken's* expert, testified that the presence of the third bar yarns in Style 5427 take it outside of the *Lesley* patent and render it a fabric of quite different character from the fabrics made according to the *Lesley* patent.

The Court finds that the evidence does not establish that a fabric made according to Nedich Celustra Style 5427 or according to any other style of Nedich Celustra group was known, described in a printed publication, in public use, reduced to practice or conceived and reduced to practice as those expressions are used in 35 U.S.C.A. § 102. In fact there is considerable doubt that such fabric was ever sold since the defendant relies upon oral testimony of incidents occurring many years ago. This places an unusual burden on the defendant as stated in *Deering* v. *Winona Harvester Works*, 155 U.S. 286, at pages 300-301, 15 S.Ct. 118 at 123, 39 L.Ed. 153 (1894):

> "As we have had occasion before to observe, oral testimony, unsupported by patents or exhibits, tending to

> show prior use of a device regularly patented, is, in the nature of the case, open to grave suspicion. (Washburn & M. Mfg. Co. v. Beat 'Em All Barbed Wire Co.) The Barbed Wire Patent, 143 U.S. 275 [36:154]. Granting the witnesses to be of the highest character and never so conscientious in their desire to tell only the truth, the possibility of their being mistaken as to the exact device used, which, though bearing a general resemblance to the one patented, may differ from it in the very particular which makes it patentable, is such as to render oral testimony peculiarly untrustworthy; particularly so if the testimony be taken after the lapse of years from the time the alleged anticipating device was used."

The Court finds that the concept of the *Lesley* patent, that is, the particular combination of stitches and the particular combination of elastic and inelastic yarns therein is not to be found in any prior art in evidence in this case. There is no evidence of use, knowledge, sale or prior invention of any fabric conforming to the terms of any of Claims 1 to 5 of the patent taking place before October 1968.

It is apparent that there is no justification for loss of presumption based upon either an error by the Examiner in considering *Cooper* or on the basis that the prior art known to the Examiner was less pertinent than other prior art cited and relied upon by the defendant during the trial.

The defendant contends that the subject matter as a whole would have been obvious at the time of the invention to a person having ordinary skill in the art and the patent is therefore invalid under 35 U.S.C.A. § 103. The expert witnesses disagree on this subject. *Beaunit* called two experts who testified that the results reached by *Lesley* were obvious to one skilled in the art, while *Milliken's* expert witness, Dr. Brown, and the Patent Examiner, Mr. Feldbaum, say otherwise. This opinion evidence must be considered in light of

all the other evidence in the case, and the Court must determine the credibility or reliability of such evidence. *Milliken's* expert and the Examiner are in agreement with each other and examined the art as it was at the time, not as it might be with certain changes.

The mere fact that an invention may seem simple and clear after it is explained or that the inventive concept is carried out by individual elements known in the art does not make it obvious. In *Manville Boiler Co.* v. *Columbia Boiler Co. of Pottstown*, 269 F.2d 600 (4th Cir. 1959), *cert. denied* 361 U.S. 901, 80 S.Ct. 208, 4 L.Ed.2d 156 (1959), the Court stated, 269 F.2d at page 604:

> "After Mandleburg pointed the way, the solution may seem simple and obvious, but it hardly can be said to have been obvious in a legal sense when Columbia's skilled craftsmen could not provide the answer, though the desirability of improvement had been recognized for many years. As Judge Sobeloff said in S. H. Kress & Company v. Aghnides, 4 Cir., 246 F.2d 718, 723:
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> "The usual defense that the result would have been obvious to one skilled in the art cannot avail the defendant here. Obviousness does not mean that one skilled in the art can perceive the solution after it has been found and pointed out by someone else; the test of obviousness is as of an earlier time, when the search is on. . . .'
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> Numerous cases give expression to the principle. Goodyear Tire & Rubber Co., Inc. v. Ray-O-Vac Co., 321 U.S. 275, 64 S.Ct. 593, 88 L.Ed. 721; Merck & Co. Inc. v. Olin Mathieson Chemical Corporation, 4 Cir., 253 F.2d 156; Otto v. Koppers Company, Inc., 4 Cir., 246 F.2d 789; Emerson v. National Cylinder Gas Company, 1 Cir., 251 F.2d 152; Muench-Kreuzer Candle Co. Inc. v. Wilson, 9 Cir., 246 F.2d 624; L-O-F Glass Fibers Company v. Watson, 97 U.S.App.D.C. 69, 228 F.2d 40."

Furthermore, in *Otto* v. *Koppers Company*, 246 F.2d 789 (4th Cir. 1957), *cert. denied* 355 U.S. 939, 78 S.Ct. 427, 2 L.Ed.2d 420 (1958), 246 F.2d at 800 the Court stated:

> "Otto does not claim that his invention embodies any new discovery of chemical principles. *His is a combination patent, each individual element of which was known in the art, but the combination and its concept were new, producing clearly improved results.* What has been said above of the work of many skilled chemical engineers in the field, the impact of this patent upon the industry and the defendants' prompt adoption of the patented apparatus demonstrates its merit and ability and forecloses the suggestion to others working in the field. The oft quoted statement of Judge Hough in *Kurtz* v. *Belle Hat Lining Co.*, 2 Cir., 280 F. 277, 281 is appropriate here:
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> 'The imitation of a thing patented by a defendant who denies invention, has often been regarded, perhaps especially in this circuit, as conclusive evidence of what the defendant thinks of the patent, and persuasive of what the rest of the world ought to think.'
>
> a principle well recognized in this Circuit. Ackermans v. General Motors Corp., 4 Cir., 202 F.2d 642; Black & Decker Mfg. Co. v. Baltimore Truck Tire Service Corp., 4 Cir., 40 F.2d 910.
>
> Revolutions, even in one branch of an industry, are infrequently the product of old ideas. Particularly in a field in which highly trained and skillful engineers were working, on various approaches, to achieve the result, the imitators can hardly be heard to say they knew all the while that the answer lay in the concept which, upon its disclosure, made their own work obsolete. *This Court, under these circumstances, cannot find the concept wanting in inventive novelty.*" (Emphasis added.)

The evidence establishes, without doubt, that the fabric made from the patent in question has been a commercial success. Witnesses described the sales of the fabric by licensees, Deering Milliken, Inc. and J. P. Stevens Company. By stipulation, notes of the sales of the fabric by the defendant were given to the Court at the end of the trial. With a knitting machine capable of producing thousands of different fabrics, it is hard to believe that the particular fabric here claimed is obvious or equivalent to fabric heretofore known. Whatever may be the opinion of *Beaunit's* experts respecting equivalency to prior art it is evident that the buying public can see enough difference between the fabric made under *Lesley* and the prior art to make this invention a commercial success in what had been before its creation a declining market. See *Otto* v. *Koppers Company, supra.*

The Court finds that the subject matter as a whole would not have been obvious at the time the invention was made to those having ordinary skill in the art.

The evidence clearly establishes that *Beaunit's* "Sensua" fabrics infringe the claims of *Lesley* Patent 3,552,154. The uncontradicted testimony of Dr. Brown and the defendant's own admission that it copied the *Lesley* fabric conclusively prove such infringement.

Mr. Lesley designed a novel textile knit fabric which filled a great need in the industry and met with instant commercial success. The fabric was smooth, opaque, light in weight, split resistant, possessed unusual stretch qualities and used much less yarn making it economic to produce. It was ideal for the construction of foundation and outter garments which conform to the body, such as girdles, brassiers, corsets, swimsuits, etc. The fabric was so successful in the market place that the defendant's sales representative in New York wired the manager of its plant in Statesville, North Carolina, to the effect that the fabric was the hottest single item in the industry and

forwarded a sample of the fabric for copying. The defendant copied the fabric and put it in production. It is continuing to produce the fabric at its Statesville plant and to market it under its "Sensua" line of fabrics represented by the style numbers of S 6000 series. The stipulated figures given to the Court indicate that the "Sensua" fabric has become an important part of the elastic fabric business of the defendant.

Milliken offered *Beaunit* a license under the *Lesley* patent at the institution of this action but such offer was declined. *Beaunit* continues to manufacture and sell the fabric. The defendant's actions are clear and ". . . whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefore, infringes the patent." 35 U.S.C.A. 271.

Beaunit has raised numerous other defenses some of which were not even discussed or mentioned at the trial. The Court has examined these defenses and finds them to be without merit.

By way of summary, the Court concludes that *Milliken* is the owner of Patent 3,552,154 and has a right to sue infringers thereof. The assignment executed by the inventor and filed with the Patent Office is in compliance with the statute and is *prima facie* evidence of the assignment, grant and conveyance of the patent and the application. 35 U.S.C.A. § 261. The defendant has offered no credible evidence sufficient to overcome the *prima facie* case.

Patent No. 3,552,154 was duly and legally issued by the Patent Office on January 5, 1971 to *Milliken* as assignee of Bascum G. Lesley and the specification and claims meet the requirements of 35 U.S.C.A. § 112. The patent, therefore, is entitled to the statutory presumption of validity decreed by the Congress in 35 U.S.C.A. § 282. By law the Patent Office is charged with the duty and responsibility of passing upon the patentability of all inventions and its

action should not be treated lightly by the courts. This preseumption is a positive factor and can be overcome by the defendant only by clear and cogent evidence. This heavy burden has not been met by the defendant here.

A piece of prior art must be read as a whole to rely on its teachings under either 35 U.S.C.A. §§ 102 or 103, and statements in such prior art which are so obscure that two conflicting theories may be deduced by experts as to that teaching and supported by equally plausible arguments are too indefinite to be utilized as an anticipation. In *Lever Bros. Co.* v. *Procter & Gamble Mfg. Co.*, 139 F.2d 633 (4th Cir. 1943), at page 641, the court said:

> "A document so obscure in its terminology that two conflicting theories may be reduced therefrom and supported by equally plausible arguments is too indefinite to be utilized as an anticipation."

In *Hillard* v. *Fisher Book Typewriter Co.*, 159 F. 439 (2nd Cir. 1908), *cert. denied* 208 U.S. 617, 28 S.Ct. 569, 52 L.Ed. 647, the court said, 159 F. at page 441:

> "Statements in a prior application relied on to prove anticipation must be so clear and explicit that those skilled in the art will have no difficulty in ascertaining their meaning. Where they are so vague, involved, intricate and contradictory that experts disagree radically as to their meaning and, following the instructions given, construct devices differing in fundamental features, it is safe to reject such a document as an anticipation."

Thus, whether the Examiner found the *Cooper* patent as a whole to be clear, or whether he found it confusing, his action was in all respects correct.

A modification of a piece of prior art which is not taught by that piece of prior art cannot be relied on under either 35 U.S.C.A. §§ 102 or 103, and no modification of the Nedich Celustra Fabric Style 5427 is taught or suggested in the record book from which it was taken. A fabric made from

the record book without change would be quite a different fabric from one made under the Lesley patent.

The presumption arises that the Examiner considered and rejected the *Decker* patent since it was classified in a subclass which he checked even though the patent is not cited as a part of the prior art. *Harris-Hub Co., Inc.* v. *Lear Seigler, Inc., supra.*

Where the prior art fails to disclose the inventive concept of the patent in suit, it is immaterial to the validity of such patent that once the concept is known one skilled in the art could readily understand it, or with slight or no difficulty build the invention by means well known in the art. The mere availability of the techniques needed to practice the invention does not negate validity under 35 U.S.C.A. § 103 where the conception is missing from the prior art teachings.

Commercial success and copying by the defendant are evidence indicative of non-obviousness of plaintiff's patented invention as well as the age and the large volume of cited prior art by the defendant.

The Court concludes that the Lesley Patent 3,552,154 and all of its five (5) claims are valid and that the defendant's "Sensua" Fabric Series 6000 infringes all five (5) of the claims of said patent. The Court further concludes that the defendant's accused fabrics were produced at its Statesville, North Carolina plant which is located within the Western District of North Carolina. An order declaring the plaintiff's patent valid and infringed by the defendant will be prepared and submitted to the Court forthwith. The Court will schedule a trial on the other issues at an early date.

This the 16th day of April, 1974.

/s/ Woodrow W. Jones
Chief Judge, United States
District Court

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

Civil Action St-C-72-10

DEERING MILLIKEN RESEARCH CORPORATION, *Plaintiff*,

v.

BEAUNIT CORPORATION, *Defendant*.

Judgment

A trial on the merits having been had and a Memorandum of Decision having been filed in the United States District of North Carolina on April 18, 1974, it is now ordered, adjudged and decreed that each and every claim of U.S. Letters Patent 3,552,154 is valid and infringed by Beaunit Corporation. A separate trial on the issues of the relief prayed for by plaintiff will be scheduled at an early date.

Date April 26, 1974

/s/ WOODROW W. JONES

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

Civil Action St-C-72-10

DEERING MILLIKEN RESEARCH CORPORATION, *Plaintiff*,

v.

BEAUNIT CORPORATION, *Defendant*.

Order

THIS MATTER is before the Court upon defendant's Motions under Rules 52 and 59, Federal Rules of Civil Procedure, for the Court to amend its Memorandum of Decision and Order heretofore entered, and for a new trial. The Court has carefully examined the voluminous Motions, including the Supplement, and is of the opinion that they should be denied.

IT IS THEREFORE, ORDERED that the defendant's Motions be, and the same are hereby denied.

This the 21st day of May, 1974.

/s/ Woodrow W. Jones
Chief Judge,
United States District Court

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-2233

DEERING MILLIKEN RESEARCH CORPORATION,
Plaintiff-Appellee,

v.

BEAUNIT CORPORATION, *Defendant-Appellant*

Appeal from the United States District Court for the Western District of North Carolina, Statesville Division,
Woodrow Wilson Jones, District Judge.

Argued: November 12, 1975 Decided: Feb. 12, 1976

Before CLARK, Supreme Court Justice,* BUTZNER and FIELD, Circuit Judges.

John A. Reilly, (Edward J. Handler, III, Arthur D. Gray, Albert J. Breneisen, Gary L. Bush, Kenyon and Kenyon, Reilly, Carr, and Chapin; B. B. Olive, William S. Rose, Donald E. Gillespie, J. Cookman Boyd, Jr., Sauerwein, Boyd and Decker on brief) for Appellant; Davidson C. Miller, (Robert W. Parkhurst, Stevens, Davis, Miller and Mosher; A. Ward McKeithen, Fleming, Robinson and Bradshaw on brief) for Appellee.

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* Associate Justice Tom C. Clark, United States Supreme Court, Retired, sitting by designation.

MR. JUSTICE CLARK:

This infringement suit brought under 35 U.S.C. § 271 by Deering Milliken Research Corporation (Milliken) against Beaunit Corporation (Beaunit) involves a patent on a warp knitted elastic fabric assigned to Milliken by one of its employees, B. G. Lesley.

The District Court sitting without a jury found that the patent was infringed. It held that "the particular combination of stitches and the particular combination of elastic and inelastic yarns therein is not to be found in any prior art in evidence in the case." *Deering Milliken Research Corp.* v. *Beaunit Corp.*, 382 F. Supp. 403, 411 (W.D. North Carolina, 1976). On appeal, Beaunit contends that the subject matter involved in the combination patent was "obvious", as defined in 35 U.S.C. § 103, and therefore not patentable; that the district court dealt with the problem as one of anticipation, rather than obviousness; and that in any event the patent was unenforceable because Deering deceived the Patent Office by not disclosing in its application the best prior art known to it. We find that the combination used was obvious and not patentable. Accordingly, we reverse the judgment and remand the case to the district court with instructions to dismiss.

1. *The Subject Matter of the Patent:*

Knit fabric is made by interlacing two inelastic threads in a series of connected loops; each row of such horizontal loops is known as "a course" while each row of vertical loops is known as "a wale." When the loops interlace solely in a vertical direction, the resulting fabric is known as "a warp knit fabric." The resulting product under any of the different knit directions is known as "ground construction." Other features may be added to the original ground construction, and these additions determine the final characteristics of the product.

One of the major cost problems in the fabric industry is the amount of yarn a particular product requires. The discomfort attributed to elastic threads that came into contact with the skin required that stretch fabrics contain much additional nonelastic yarn to cover these elastic threads, but the additional yarn added to the cost of the fabric. Here Milliken sought to produce a fabric having "good stretch characteristics" and still be less expensive than those then on the market. Its employee, B. G. Lesley, the inventor, studied the problem, made his discovery, and then worked out an application for a patent covering his new fabric. The patent application described:

> a warp knitted elastic fabric having, in combination, a knitted ground construction composed of a plurality of wales and courses composed of single thread stitches, one thread of each of said pairs forming stitches in adjacent wales and alternate courses, the other thread of each of said pairs forming stitches in non-adjacent wales and alternate courses, and a plurality of elastic threads extending between the wales and generally parallel thereto and being invalid in the ground construction.

The Examiner rejected the application, stating:

> Claim 1 is rejected as unpatentable over Auville et al. in view of Cooper, under 35 U.S.C. 103.

He then explained how the disclosures of Auville and Cooper prevented the patent of the fabric utilizing their teaching because to do so would be "an obvious expedient." Lesley then amended his Claim 1 to define the particular manner in which he would inlay the elastic threads. He repeated the same claim as above, but added language about covering the elastic threads:

> with an inelastic thread of such ground construction wrapped about each of said elastic threads to maintain the same in the ground construction.

It is clear from this language that it was not the ground construction that was patented, nor the inlaying of the elastic threads, but rather that the threads of the ground construction would be utilized in the wrapping of the elastic threads.

Beaunit's defense to the infringement suit concentrated upon the validity of Lesley's patent, claiming that the "wrap around" feature was "obvious" under the standards of 35 U.S.C. § 103. The district court, 382 F. Supp. 403 (W.D. N.C. 1974), upheld the patent by deciding this claim against the appellant. First, the district court announced that:

> The mere fact that an invention may seem simple and clear after it is explained or that the inventive concept is carried out by individual elements known in the art does not make it obvious.

Id. at 411. After reviewing numerous authorities and cases that had upheld the validity of combination patents, the district court turned to the unchallenged commercial success of the new fabric:

> The evidence establishes, without doubt, that the fabric made from the patent in question has been a commercial success . . . [I]t is evident that the buying public can see enough difference between the fabric made under *Lesley* and the prior art to make this invention a commercial success in what had been before its creation a declining market. See *Otto* v. *Koppers Co.*, [246 F. 2d 789 (4th Cir. 1957), *cert. denied* 355 U. S. 939].

Id. at 413. After reviewing the prior art offered by Beaunit, the court decided that it failed to disclose the inventive concept of the patent in suit. By the court's own admission, commercial success and Beaunit's swift movement to copy the fabric for its own line of stretch knits played significant roles in the decision to uphold the patent:

> Commercial success and copying by the defendant are evidence indicative of non-obviousness of plaintiff's

> patented invention as well as the age and the large volume of cited prior art by the defendant.

Id. at 414.

The alleged infringer, Beaunit, had the burden of proving that the patent, presumed to be valid, did not meet statutory requirements of validity, *Filterite Corp.* v. *Tate Engineering, Inc.*, 318 F. Supp. 584 (D. Md. 1970), *aff'd* 447 F. 2d 62 (4th Cir. 1971). The district court's decision that the "wrap around" feature of Lesley's invention was non-obvious under § 103 was a determination, as a question of law, that Beaunit had not met its burden. Thus, we are free to disagree with the district court even if we cannot brand his conclusion on the issue of obviousness as clearly erroneous.

Nevertheless, "obviousness is a question of law determined against the *factual* background of the state of the prior art and the claimed improvement on it." *Stamicarbon, N.V.* v. *Escambia Chemical Corporation*, 430 F. 2d 920, 924 (5th Cir. 1970), *cert. denied* 400 U. S. 944 (1970) (emphasis supplied). In *Graham* v. *John Deere Co.*, 383 U. S. 1 (1966), the Supreme Court recognized that:

> While the ultimate question of patent validity is one of law, *A. & P. Tea Co.* v. *Supermarket Corp.*, 340 U. S. at 155, the § 103 condition. which is but one of three conditions, each of which must be satisfied, lends itself to several basic factual inquiries. Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent are resolved.

Id. at 17. Accordingly, appellate courts are reluctant to discredit the conclusion the district court may reach on the issue of obviousness. See *Chicago Rawhide Mfg. Co.* v. *Crane Packing Co.*, 523 F. 2d 452, 460 (7th Cir. 1975). We must be convinced that the district judge committed an error requiring reversal.

It was the district court's responsibility to make the factual inquiries required by § 103 and the principles of *Graham, supra.* The scope and content of the prior art, the differences between that prior art and *Leslie's* alleged invention, and the level of ordinary skill in the fabric industry were the factual determinations to be made in this case. Such factors as the commercial success of Milliken's new fabric and Beaunit's swift move to pirate the concept for its own fashion line are, both by the statute and by the reasoning of *Graham,* secondary considerations, indicia of obviousness that may or may not be relevant to the claim. The presumption of validity must first be tested against the three aforementioned factors. It is upon them that we must focus our review.

2. *The Teaching of Auville and Cooper:*

After careful study of the entire record, we find it impossible to uphold the validity of the *Lesley* patent. According to the principles of § 103, the discovery of this process for creating a warp knitted elastic fabric with an economy of thread was not patentable because of its obviousness from the prior art of *Cooper* and *Auville.*

It is not disputed nor could it be that *Auville* teaches the ground construction used in *Lesley;* they are identical. Nor do we believe that Lesley developed any *new* method to maintain and cover the elastic threads in the ground construction. As Deering's own attorney said, "[t]he whole point of the invention is that you wrap around the elastic." This we submit was fully disclosed in *Cooper* where the elastic thread was inlaid between the wales and was wrapped by a ground thread. In this regard we note that Beaunit's expert testified with regard to *Cooper* that "the underlaps of the ground bar, in fact, wrap around the rubber thread in exactly the same way as they do in Figure 1 of the Lesley patent." Significantly this statement not only went unchallenged on cross-examination, but Deering's expert concurred that Cooper taught the

"wraparound" feature.[1] This testimony was supported by other witnesses. There was no disagreement among the experts on this "wrap around" feature of *Cooper* and given that "the whole point of the invention is that you wrap around the elastic," the invention is fully disclosed by the prior art. Nor is the fact that Cooper is a one-way stretch of any significance. It was designed as such: the extra thread was placed in it for that purpose. Indeed, Deering's expert admitted that all one had to do to have a two-way stretch was to remove the extra inelastic thread in *Cooper*.

We see no reason to discuss this feature of the case further. It is true, of course, that a patent is presumed to be valid and the burden of establishing invalidity is upon Beaunit. It has met that burden conclusively. The finding of the trial court that *Cooper* "as a whole had no conception of a wrap around for cover purposes" is clearly erroneous. Indeed, even Deering's counsel admits the contrary, and the expert testimony on both sides is to the same effect.

Accordingly, we reverse the judgment below and remand the case to the district court for dismissal.

It is so ordered.

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[1] The appellant's expert stated:

> Well it represents one yarn, the one I drew in red which is *K* which is making a ground construction, this diagram by itself shows that yarn wrapping around two other yarns one of which I know from the context of the document to be an elastic rubber yarn and the other of which I know to be a covering yarn of inelastic nature, . . .

APPENDIX E

[Filed March 5, 1976]

UNITED STATES COURT OF APPEALS
FOR THE FORTH CIRCUIT

No. 74-2233

DEERING MILLIKEN RESEARCH CORPORATION,
Appellee,

versus

BEAUNIT CORPORATION,
Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville.

Upon consideration of appellee's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is, therefore, ORDERED, that the petition for rehearing be and it is hereby denied.

For the Court — By Direction

/s/ WILLIAM K. SLATE
CLERK

APPENDIX F

The Constitution of the United States

ARTICLE I, SECTION 8

The Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.

AMENDMENT V

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code

Title 35—Patents

§ 103. Conditions for patentability; non-obvious subject matter

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

§ 154. Contents and term of patent

Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, subject to the payment of issue fees as provided for in this title, of the right to exclude others from making, using, or selling the invention throughout the United States, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.

§ 261. Ownership; assignment

Subject to the provisions of this title, patents shall have the attributes of personal property.

• • •

§ 282. Presumption of validity; defenses

A patent shall be presumed valid. Each claim of a patent (whether in independent or dependent form) shall be presumed valid independently of the validity of other claims; dependent claims shall be presumed valid even though dependent upon an invalid claim. The burden of establishing invalidity of a patent of any claim thereof shall rest on the party asserting it.

• • •

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1648

DEERING MILLIKEN RESEARCH CORPORATION, *Petitioner,*

v.

BEAUNIT CORPORATION, *Respondent.*

REPLY TO RESPONDENT'S LETTER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVIDSON C. MILLER
Attorney for Petitioner

Of Counsel:

ROGER W. PARKHURST
STEVENS, DAVIS, MILLER & MOSHER
1911 Jefferson Davis Highway
Arlington, Virginia 22202

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v.

BEAUNIT CORPORATION, *Respondent.*

REPLY TO RESPONDENT'S LETTER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On May 25, 1976, Respondent, Beaunit Corporation, wrote an unprinted letter to the Clerk of this Court expressly waiving its right to file a brief in opposition to the Petition herein. Since that letter also contains argument, Petitioner files this Reply.*

Respondent totally erroneously says the Petition does not raise an issue pursuant to Rule 19 of this Court, such as a conflict between circuits or failure to apply applicable decisions of this Court.

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* Respondent's letter, insofar as it argues in opposition, does not comply with the provisions of Rules 24, 39, or 40 of this Court.

The Petition, pages 13-18, expressly demonstrates that the Court of Appeals:

1. Ignored the express language of the applicable statutes.
2. Ignored applicable decisions of this Court.
3. Ruled in direct conflict with settled rulings of coordinate Courts of Appeals.

The Petition also expressly demonstrates how the lower Court's failure to properly apply the applicable statutes and decisions of this Court led to an erroneous result.

While Petitioner recognizes that this Court is very busy and profoundly concerned with many cases, Petitioner is confident that this Court is aware that no question is more important than the uniform and proper administration of justice by our Federal Courts. The lower Court in this case clearly departed from that uniform and proper administration of justice, now necessitating exercise of this Court's power of supervision.

The Petition should be granted to correct those errors.

Respectfully submitted,

DAVIDSON C. MILLER
Attorney for Petitioner

Of Counsel:

ROGER W. PARKHURST
STEVENS, DAVIS, MILLER & MOSHER
1911 Jefferson Davis Highway
Arlington, Virginia 22202

May 28, 1976